

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LAFAYETTE PHIFER,	:	APPEAL NO. C-090861
	:	TRIAL NO. SP-0900042
Petitioner-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
STATE OF OHIO,	:	
	:	
Respondent-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

In 1994, in Columbiana County, Ohio, petitioner-appellant Lafayette Phifer pleaded guilty to and was convicted of two counts of sexual battery. Phifer was sentenced in 1999 to concurrent terms of two years' incarceration. The trial court did not hold a sexual-offender classification hearing or enter an order classifying Phifer as a sexual offender. Therefore, Phifer was a sexually oriented offender by operation of law under former R.C. Chapter 2950 ("Megan's Law").² Phifer was informed when he was released from prison in 2001 that he was required to annually register as a sexual offender for ten years.

Phifer received a notice from the Ohio Attorney General stating that he had been reclassified under Am.Sub.S.B. No. 10 ("Senate Bill 10") as a Tier III sex offender and

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² See *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502; *In re Abney*, 1st Dist. No. C-080053, 2008-Ohio-4379; *In re Hawkins*, 1st Dist. No. C-080052, 2008-Ohio-4381; *State v. Cooper*, 1st Dist. No. C-030921, 2004-Ohio-6428.

that he was required to register with the local sheriff every 90 days for life. Phifer filed an R.C. 2950.031(E) petition to contest his reclassification, challenging the constitutionality of Senate Bill 10. He also filed an R.C. 2950.11(F)(2) motion for relief from the community-notification provisions. After a hearing, the trial court overruled Phifer's constitutional challenges to Senate Bill 10 and denied his R.C. 2950.031(E) petition. The court did not find that Phifer was subject to community notification.

Phifer's first assignment of error, which alleges that the retroactive application of Senate Bill 10's tier-classification and registration requirements violates the constitutional ban on ex post facto laws, is overruled.

"The Ex Post Facto Clause applies only to criminal statutes."³ We held in *Sewell v. State*⁴ that the tier-classification and registration provisions of Senate Bill 10 are remedial and not punitive, and that they do not have the effect of converting a remedial statute into a punitive one. Because Senate Bill 10's classification and registration provisions are civil and remedial, not criminal, they do not violate the constitutional ban on ex post facto laws.

Phifer's second and fourth assignments of error are overruled because the retroactive application of Senate Bill 10's tier-classification and registration requirements does not violate the prohibition on retroactive laws contained in Section 28, Article II of the Ohio Constitution or the Double Jeopardy Clause of the Ohio Constitution.⁵ Phifer's arguments under the United States Constitution are also overruled on *Sewell's* reasoning.

³ See *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570, citing *California Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 504, 115 S.Ct. 1597, and *Collins v. Youngblood* (1990), 497 U.S. 37, 43, 110 S.Ct. 2715.

⁴ 181 Ohio App.3d 280, 2009-Ohio-872, 908 N.E.2d 995.

⁵ *Id.*

Phifer's third assignment of error alleges that Senate Bill 10's requirement that the attorney general reclassify him as a Tier III sex offender violates the separation-of-powers doctrine inherent in Ohio's Constitution. We addressed and rejected that argument in *Sewell v. State*,⁶ holding that the retroactive application of Senate Bill 10's tier-classification and registration requirements did not violate the separation-of-powers doctrine. In *Green v. State*,⁷ we revisited the separation-of-powers issue in light of the Ohio Supreme Court's decision in *State v. Bodyke*.⁸ We held in *Green* that the supreme court's decision in *Bodyke* did not apply to cases in which there is no prior court order classifying the offender under a sex-offender category.⁹ In cases where there has been no prior judicial adjudication of the offender under a sex-offender category, our holding in *Sewell* is still applicable.¹⁰

The record does not contain a final court order classifying Phifer under Megan's Law. Therefore, the *Bodyke* decision does not apply to him, and pursuant to our holdings in *Sewell* and *Green*, his reclassification by the attorney general under Senate Bill 10 does not violate the separation-of-powers doctrine.¹¹ The third assignment of error is overruled.

Phifer's fifth assignment of error is overruled. Phifer has no standing to challenge Senate Bill 10's residency restriction because he has not shown that he lives in or owns property within the restricted area or that he has been forced to move outside

⁶ Id.

⁷ *Green v. State*, 1st Dist. No. C-090650, 2010-Ohio-4371.

⁸ ___ Ohio St.3d ___, 2010-Ohio-2424, ___ N.E.2d ___.

⁹ See *Green v. State*, supra, ¶9, at fn. 7.

¹⁰ See id.

¹¹ See id. at ¶10.

the restricted area.¹² We note that the Ohio Supreme Court held in *Hyle v. Porter*¹³ that because the residency restriction in former R.C. 2950.031 was not expressly made retrospective, it could not be applied to an offender who had bought his home and committed his offense before the effective date of the statute.

Phifer's sixth and seventh assignments of error, which allege that reclassifying him as a Tier III sex offender under Senate Bill 10 constituted a breach of his plea agreement and an impairment of an obligation of contract, in violation of Section 28, Article II of the Ohio Constitution and Clause I, Section 10, Article I of the United States Constitution, are overruled.¹⁴ The retroactive application of Senate Bill 10's tier-classification and registration requirements to a sex offender who pleaded guilty to a sexually oriented offense pursuant to a plea bargain does not violate the Contract Clause of the Ohio and United States Constitutions, because when the offender entered his plea he had no reasonable expectation that his sex offense would never be made the subject of future legislation and no vested right concerning his registration duties.¹⁵ Senate Bill 10's tier-classification and registration requirements are remedial, collateral consequences of the underlying criminal sex offense, and they do not affect a plea agreement previously entered between the state and the offender.¹⁶

¹² See *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112, reversed in part and remanded on other grounds, *In re Sexual Offender Reclassification Cases*, ___ Ohio St.3d ___, 2010-Ohio-3753, ___ N.E.2d ___; *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059; *State v. Duncan*, 3rd Dist. No. 7-08-03, 2008-Ohio-5830.

¹³ 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899.

¹⁴ Judge Hendon agrees that the sixth and seventh assignments of error are without merit not for the reasons given in the body of this judgment entry, but because there is no evidence that Phifer's registration requirement was a term of any plea agreement. Judge Mallory agrees that the sixth and seventh assignments of error are without merit not for the reasons given in the body of this judgment entry, but for the reasons set forth in his separate concurrence in *Nixon v. State*, 1st Dist. No. C-090219, 2010-Ohio-767.

¹⁵ See *White v. State*, 1st Dist. No. C-090177, 2010-Ohio-234; *Burbrink v. State*, 185 Ohio App.3d 130, 2009-Ohio-5346, 923 N.E.2d 626, reversed in part and remanded on other grounds, *In re Sexual Offender Reclassification Cases*, ___ Ohio St.3d ___, 2010-Ohio-3753, ___ N.E.2d ___.

¹⁶ See *id.*

Phifer's eighth assignment of error, alleging that the retroactive application of Senate Bill 10's registration requirements constitutes cruel and unusual punishment, is overruled because the statutes are civil and remedial, not punitive.¹⁷ Therefore, the registration requirements cannot be viewed as punishment.¹⁸

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HENDON and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 22, 2010
per order of the Court _____.
Presiding Judge

¹⁷ See *Sewell v. State*, supra, at fn. 4.

¹⁸ See id.; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195; *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051.